

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS J. PROKAY, JR.,  
Petitioner

CIVIL ACTION

v.

FRANK D. GILLIS, et al.,  
Respondents

NO. 01-5600

ORDER

AND NOW, this 6<sup>th</sup> day of March, 2002, upon  
consideration of the Petition for Writ of Habeas Corpus, the  
Respondent's Answer, the documents attached thereto, and after  
review of the Report and Recommendation of United States  
Magistrate Judge Arnold C. Rapoport, and the petitioner's  
objections thereto, IT IS HEREBY ORDERED that:

1. the Report and Recommendation is APPROVED and  
ADOPTED, subject to the qualifications set forth below;
2. the Petition for Writ of Habeas Corpus is DENIED  
and DISMISSED; and,
3. there is no probable cause to issue a certificate  
of appealability.

The Report and Recommendation concluded that the  
pending Petition **for** Writ of Habeas **Corpus** is time-barred by the  
one year statute **of** limitations as set forth in the Antiterrorism  
and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C.

§2244(d). The Court agrees with this conclusion. However, the petitioner has raised a valid objection that warrants discussion.

The Report and Recommendation concluded that, after allowing for the proper amount of statutory tolling, the petitioner would have had to file a habeas petition by July 26, 2001 in order for it to be timely. The Court agrees with this calculation. The Report and Recommendation then held that because the petitioner filed his habeas petition on December 6, 2001, it is untimely and should be denied and dismissed.

The petitioner objects that his petition was not filed on December 6, 2001, but rather was originally filed in the Middle District of Pennsylvania on October 17, 2001, and that he had actually executed the petition on or about October 5, 2001. A review of the procedural history of the current petition supports the petitioner's objections.

On October 17, 2001, the Petition for Writ of Habeas Corpus was filed in the United States District Court for the Middle District of Pennsylvania. By order of October 30, 2001, United States District Judge Yvette Kane directed the clerk of court to transfer the petition to the Eastern District of Pennsylvania because the convictions underlying the petition were procured in state courts located within the Eastern District. The petition was received by the Eastern District on November 6,

2001. Because the petition was written on the forms provided for by the Middle District, on November 16, 2001 the petitioner was ordered to complete his petition on the correct Eastern District forms and to resubmit it. The corrected forms were received by the Court on December 12, 2001.<sup>1</sup>

The Court finds that the petitioner's objection regarding the filing date of his habeas petition has merit. His habeas petition was filed on the correct forms, and was docketed in the Middle District of Pennsylvania, on October 17 2001. Because he executed that petition on October 5, 2001, the mailbox rule applies, and October 5 counts as the date on which his petition was filed in the Middle District. The delay caused by the transfer of the habeas petition to the Eastern District, and the subsequent delay caused by the need for the petition to be filed on the forms for the Eastern District, should not count against the timeliness of the petition. This result is supported as well by the principles underlying the doctrine of equitable

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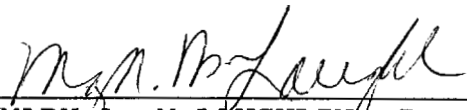
<sup>1</sup> In concluding that the petition was filed on December 6, 2001, the Report and Recommendation properly took into account the "mailbox rule" which provides that a habeas petition is deemed filed on the date a prisoner gives the document to prison authorities for mailing. See Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1998). Because the petitioner averred that he executed the habeas petition on December 6, 2001, that date, rather than the December 12, 2001 date on which the Court received the petition, was the proper one to consider.

tolling. See Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999) (noting that timely asserting rights in the wrong forum justifies the equitable tolling of the one-year limitation period of the AEDPA). For these reasons, the Court will consider the petitioner's Petition for Writ of Habeas Corpus as being filed on October 5, 2001.

Nevertheless, as outlined in the Report and Recommendation, in order to be timely under the AEDPA's one-year statute of limitations, the petitioner's habeas petition would have had to have been filed by July 26, 2001. Even considering a filing date of October 5, the petition was filed nearly two and one-half months late. Because the petitioner has raised no other considerations that would justify equitable tolling, his petition is untimely and must be denied and dismissed.'

ued 3/6/02:  
Thomas Piskay Jr.  
Kelly Sekula, Esq.

BY THE COURT:

  
MARY A. McLAUGHLIN, J.

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<sup>2</sup> The petitioner also objects that because his petition was filed within one year of November 15, 2000, the date that the Superior Court affirmed the PCRA court's denial of post-conviction relief, his petition is timely under the AEDPA. This argument fails to recognize that by November 15, 2000, 202 days of the one year time period allotted by the AEDPA had already elapsed, as outlined on page 5 of the Report and Recommendation.